IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE V.GIRI

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

MFA.No. 632 of 2001()

WCC.65/1995 of W.C.C.,THRISSUR
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APPELLANT: 2nd opp. party

New India Assurance Company Ltd., Jamshedpur rep. by the Dy. Manager, regional Office, Kochi.

BY ADV. SRI.RAJAN P.KALIYATH

RESPONDENTS: applicant & OP 1
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1. Santhosh Das, S/o. Ponnudas, Indukudy Village, PO Idukki, Marubhanch District, Orissa.

2. Tata Engineering & Locomotive Co. Ltd., Jamshedpur Pin 831010.

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 23/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP 5304/01 IN MFA 632/01

DISMISSED.

Sd/- J.B.Koshy, Judge.

Sd/- V.Giri, Judge.

23/8/2007

J.B.Koshy & V. Giri, JJ.
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M.F.A.No.632 of 2001
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Dated this the 23rd day of August, 2007.

JUDGMENT

Koshy,J.

This appeal is filed by the Insurance Company challenging the order of the Commissioner for Workmen's Compensation. The main contention raised by the appellant is that the physical disability certified was 50%. But the Commissioner assessed 100% loss of earning capacity based on the Medical Officer's report assessing the loss of earning capacity. It was contended that when there is only 50% physical disability, compensation can be granted only for 50% loss of earning capacity. Ext.A6 is the disability certificate. After assessing the disability, the Doctor found as follows:

> "(1) Malunited fracture right femur with disc discharging sinus right thigh due to bone infection.
>
> 2) Shorting right thigh 1.5 cm.
>
> 3) Gross instability left knee as a resuilt of total patellectomy left knee (removal of patella)

4) Limping right lower limb.

5) Right knee stiff only 30 flexion is possible. (Normal range 130)

6) Left knee only 45 flexion is possible (Normal range 130)

7) United fracture left tibia.

The Doctor was also made the disabililty evaluation as shown below:

(a) Shock and Mental strain.

b) Permanent disability is assessed as 50%.

He was a Driver by profession and because of the above disabilities he cannot drive the vehicle in future and his loss of earning capacity as a Driver was assessed as 100%."

The claimant also deposed that he is unable to do any other job because of the injuries. He cannot bent his knee. He is unable to do the work of Driver and he will not get any job.

2. The injuries suffered by the claimant are not scheduled injuries. In such cases, compensation is to be calculated as provided in Section 4(1)(c)(ii) of the Workmen's Compensation Act, which is as follows:

"4. **Amount of compensation**

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

xx xx xx xx xx xx

xx xx xx xx xx xx

(ii)in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;"

This statutory provision mandates that assessment should be based on the certificate of qualified medical practitioner and commissioner cannot assess loss of earning power arbitrarily as held by the Full Bench of this Court in **New India Assurance Co. Ltd.** v. **Sreedharan** - 1995(1) K.L.T. 275. Now, it is settled law that commissioner has to rely on qualified medical practitioner's certificate for assessment of loss of earning capacity. But, loss of earning capacity is different from physical disability and as held by a five member Bench of the Apex Court in **Pratap Narain Singh Deo** v. **Shrinivas Sabata and another** - A.I.R. 976 S.C. 222 = (1976) 1 S.C.C. 289)

compensation has to be awarded not with reference to loss of physical capacity, but, with reference to the loss of 'earning capacity' which is to be assessed with reference to the nature of job the workman was doing. In the above case, a carpenter, whose left hand from elbow was amputated, was granted compensation for 100% loss of earning capacity as it has the effect of total disablement as defined under Section 4(1)(c)(ii) of the Act. In this case, commissioner did not assess the loss of earning capacity arbitrarily, but, assessed the same based on the medical certificate and nature of employment. Further, considering the nature of disabilities, we are also of the opinion that it is very difficult for the claimant to get any job and it cannot be said that the assessment of earning capacity of the claimant based on a Medical Practitioner's certificate is arbitrary. Further, the accident occurred on 10.3.1994 before the amendment of the Act, Act 30 of 1995. Therefore, even though as a Driver, he was getting more salary, only Rs.1,000/- was taken as the monthly income and Commissioner calculated the compensation as in **KSEB** v. **Valsala** - A.I.R. 1999 S.C. 3502 it was held that the compensation has to be calculated on the date

of accident. Here Commissioner calculated the compensation based on the statutory provision as applicable on the date of accident. Considering the total amount granted and considering the nature of the injuries, we are of the opinion that no interference is required.

Appeal is dismissed.

J.B.Koshy,
Judge.

V.Giri,
Judge.

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